No. 06-694

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL WILLIAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF AUTHORITIES

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Respondent offers no reason for this Court to leave unreviewed the court of appeals' holding that 18 U.S.C. 2252A(a)(3)(B) (2000 & Supp. IV 2004) is unconstitutionally vague and overbroad. Section 2252A(a)(3)(B) proscribes knowingly "advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing] * * * any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material" contains illegal child pornography. In striking down that statutory provision in all its applications, the court of appeals misconstrued the scope of the law and misapplied well-established overbreadth and vagueness principles. Respondent suggests that the court of appeals was correct, but this Court generally reviews decisions striking down an Act of Congress as unconstitutional to determine for itself whether the statute is compatible with the Constitution. That course is particularly appropriate

here both because the case involves an effort to bring the law into conformity with the Court's precedents and because the case implicates the compellingly important context of regulating conduct that supports the illicit child pornography market.

1. The decision below declares an Act of Congress unconstitutional on its face. Pet. App. 1a. The decision warrants this Court's review for that reason alone. As the petition explains (at 4-7, 13-14), Section 2252A(a)(3)(B) reflects Congress's effort to comply with this Court's decision in *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002). In response to the concern expressed in *Free Speech Coalition* that the "pandering" provision at issue there "punishe[d] even those possessors who took no part in pandering," *id.* at 242-243, Congress sought in Section 2252A(a)(3)(B) to ban the pandering itself: "[t]he crux of what this provision bans is the offer to transact in this unprotected material, coupled with proof of the offender's specific intent." S. Rep. No. 2, 108th Cong., 1st Sess. 12 (2003). Congress has the power to proscribe such offers, and the court of appeals' decision should not be allowed to stand without plenary review of the statute by this Court.

2. The only reason respondent provides (Br. in Opp. 12-16) for denial of certiorari review is his contention that the decision below is correct. First, he argues (*id.* at 14) that the text of Section 2252A(a)(3)(B) is vulnerable under *Free Speech Coalition* because the statute's use of the phrase "reflects the belief, or * * * is intended to cause another to believe" is indistinguishable from the phrases "[a]ppears to be" and "conveys the impression" invalidated in *Free Speech Coalition*. But respondent's attempted equation of the invalidated phrases with Section 2252A(a)(3)(B)'s language fails for several reasons.

Significantly, the context and meaning of the phrases in Section 2252A(a)(3)(B) are entirely different. The two provisions in *Free Speech Coalition* expanded the definition of what constitutes child pornography, 535 U.S. at 241, and the Court concluded that the definitions were overbroad in part because depictions that "appear[] to be" child pornography may well be constitutionally protected. *Id.* at 244-251. But, as the court of appeals here recognized (Pet. App. 16a-18a), Section 2252A(a)(3)(B) "targets only the act of pandering" or soliciting depictions that are, as represented, constitutionally unprotected; it does not regulate underlying depictions at all. The current statute also does not "prohibit[] possession of material described, or pandered, as child pornography by someone earlier in the distribution chain," as did the "conveys the impression" provision struck down in *Free Speech Coalition*. 535 U.S. at 257-258. Nor does the decision in *Free Speech Coalition* lend any support to respondent's vagueness argument; the Court invalidated the statutory provisions in question as overbroad, not as vague. *Id.* at 258. And the Court recognized that "[t]he Government, of course, may * * * enforce criminal penalties for unlawful solicitation." *Id.* at 251-252. That is exactly what Section 2252A(a)(3)(B) does. Accordingly, the appropriate constitutional analysis here focuses on whether Congress has validly trained on speech that purports to solicit or offer "what remains clearly restrictable child pornography under pre- and post-*Free Speech Coalition* Supreme Court jurisprudence: obscene simulations of minors engaged in sexually explicit conduct and depictions of actual minors engaged in same." Pet. App. 19a.

Respondent's remaining arguments, based on a hypothetical (Br. in Opp. 14-15), merely expose the fatal flaws in the court of appeals' reasoning. The court of appeals read

the law more broadly than its language warrants. See Pet. App. 22a-26a, 35a-36a, 38a-42a. Limited to its proper scope, the statute is neither vague nor overbroad, and it is completely consistent with the Constitution.

Section 2252A(a)(3)(B) makes it unlawful to offer or to solicit material that is or purports to be illegal contraband, specifically, "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct." 18 U.S.C. 2252A(a)(3)(B) (2000 & Supp. IV 2004) (Pet. App. 77a-78a). Properly construed, the provision contains both an objective and a subjective intent requirement. See Pet. 15-16. As for the objective component, the law requires that a reasonable person must conclude from the language and context of the communication (its "manner") that the speaker has the "belief" that illegal child pornography is available or desired, or that the communication is "intended to cause another to believe" that the advertised, promoted, or solicited material is illegal child pornography. 18 U.S.C. 2252A(a)(3)(B) (2000 & Supp. IV 2004) (Pet. App. 77a). As for the subjective component, the law requires that a speaker must have the specific intent to traffic (or purport to be trafficking) in child pornography, *i.e.*, that the communication be made "knowingly." *Ibid.*; see *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).[*] Those objective and subjective requirements protect against improper applications of the law and give it the requisite clarity. See Pet. 16-21.

Far from demonstrating the correctness of the court of appeals' opinion, respondent's hypothetical example (Br. in

[*] See H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 61-62 (2003) ("[T]he government establishes a violation with proof of the communication and requisite specific intent."); S. Rep. No. 2, *supra*, at 12 (noting that the provision requires "proof of the offender's specific intent").

Opp. 14-15) illustrates the court's error. If a man walked by six strangers sitting on a bus bench and said "I've got some great juicy pictures of hot young babes" (*id.* at 14), his statement would not fall within the proscription of Section 2252A(a)(3)(B). A reasonable person could not conclude from the language and context of that communication that the speaker believes that he is offering illegal child pornography or that the speaker intends those listeners to so conclude. Furthermore, nothing in the hypothetical suggests that the speaker subjectively understands that a reasonable person would so construe his statement. Respondent's hypothetical—like the hypothetical examples given by the court of appeals (Pet. App. 40a-41a)—cannot justify the court's conclusion that the statute encompasses "a substantial amount of lawful speech in relation to its legitimate sweep," *id.* at 37a, or that the statute "fails to convey the contours of its restriction with sufficient clarity," *id.* at 42a.

As explained in the certiorari petition (at 16-19), even assuming that the statute encompasses some actual instances of protected speech, "that assumption would not 'justify prohibiting all enforcement' of the law unless its application to protected speech is substantial, 'not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications.'" *McConnell* v. *FEC*, 540 U.S. 93, 207 (2003) (quoting *Virginia* v. *Hicks*, 539 U.S. 113, 119-120 (2003)). Certainly nothing in this record would justify such a conclusion, and the court of appeals did not even undertake the appropriate analysis to quantify and compare the supposed protected applications with the proscribable ones. Even assuming that the statute covers some protected speech, any such speech can be protected through case-by-case adjudication. *Hicks*, 539 U.S. at 124; *New York* v. *Ferber*, 458 U.S. 747, 773-774 (1982). There is

no basis for the court of appeals' holding that Section 2252A(a)(3)(B) is unconstitutional in all its applications.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

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